THE

AMERICAN LAW REGISTER.

AUGUST, 1865.

TESTIMONY OF PARTIES IN CRIMINAL PROSECUTIONS.*

BANGOR, Feb. 22d, 1865.

MY DEAR SIR,—Your letter was duly received, but the pressure of official engagements prevented my giving it immediate attention.

The legislature of this state in 1859 passed an act by which any respondent in any criminal prosecution for "libel, nuisance, simple assault, assault and battery" might, by offering himself as a witness, be admitted to testify. In 1863 the law as to admission was further extended, and it was enacted that "in the trial of all indictments, complaints, and other proceedings against persons charged with the commission of crimes or offences, the person so charged *shall at his own request, and not otherwise*, be deemed a competent witness; the credit to be given to his testimony being left solely to the jury, under the instructions of the court." These changes in the law of evidence are, as you will perceive, very recent, but so far as I can judge, they are favorable to the ascertainment of the truth—the great end for which judicial proceedings are instituted.

* We print the letter of Chief Justice APPLETON on this important subject, from a report of a committee of the Senate of Massachusetts, to a member of which the letter was addressed, in answer to an inquiry as to the workings of the law in Maine.—EDS. A. L. R.

The legislature of your state, as well as those of nearly all the states in the Union, has recognised the necessity of receiving the testimony of interested witnesses and of the parties in all civil proceedings, and this upon the most satisfactory and conclusive reasoning. In England similar modifications of the law have taken place, and it is not too much to say, that they have received the sanction and approbation of her most able and learned jurists, and that too with an unanimity of opinion rarely before witnessed in any previous important alteration of the law or of political institutions.

But if the parties are admitted to testify in civil proceedings, and such amdission is necessary for the purposes of justice, the necessity and importance of their admission become the more imperative as the interests involved increase. In civil procedure, the result is an execution for one and against the other party, as a consequence of which one becomes the debtor of the other. The title to real or personal property is determined to be in one or the other of the litigating parties. In criminal proceedings, life, honor, liberty, property, may all be at stake. If then, the testimony of the parties is needed in civil, much more will it be needed in criminal procedure.

The question, it may be observed, is not whether a reluctant and unwilling witness should be compelled, but whether a respondent voluntarily offering himself as a witness should be received to testify.

In criminal procedure, the party injured in person or property is received as a witness against the person by whom the injury is alleged to have been inflicted. In case of murder, the dying declarations of the deceased are admitted. The law presumes the accused innocent. The trial proceeds with that presumption. Yet during the trial, when the question of guilt or innocence is to be determined, the party injured or alleging he is injured is admitted to testify, while the respondent presumed innocent is denied a hearing. *Audi alteram partem.* Hearing both sides of a controversy is so obvious a dictate of impartial justice that one may well marvel that its wisdom and propriety should ever have been called in question, much more that it should have been denied.

Of whom inquire but of the parties? They are the sources from whom information may be most naturally and readily obtained. The facts are within the knowledge of the respondent.

He knows whether or not he was a party to the commission of the offence of which he is accused. Accuracy of original perception, strength of subsequent recollection — qualities especially desirable in a witness — will never be wanting. If to these you add trustworthiness, you have the most essential qualifications. But whether any witness will be trustworthy, whether in any given case he will utter the truth, can only be known *after* and not *before* the delivery of his testimony. If it were deemed a pre-requisite to admission, that a witness should be truthful in the evidence about to be delivered, there is not, there never will be, a witness of whom this can be predicated with assured certainty in advance. This much can be known in all cases. The respondent, like any, like all witnesses, will speak the truth or not according to the number and pressure of the motives acting upon him, and tending in a truthful as compared with those acting in a different and opposite direction.

The respondent is either innocent or guilty. If innocent, the truth will best serve his turn. His testimony will then be true. If the only testimony by which his innocence can be proved, is excluded, misdecision is inevitable. If innocent, the exculpatory facts may be known to him alone. If there be other testimony, still the corroborative force of his own evidence may be required to overcome the weight of adverse proofs. If innocent, it can hardly happen that his testimony will not be desired for the entire satisfaction of the jury.

It may be urged that the embarrassments of his position may lead to confusion on the part of the innocent respondent, and confusion to misstatements, and thus that misdecision may follow. When this is the only or the principal evidence, misdecision would inevitably ensue without its admission. Its reception affords the only chance for the escape of innocence. But confusion is not the usual accompaniment of innocence. An innocent man would hardly decline stating the truth, when it is his only hope, and instead thereof plunge into falsehood, thus insuring or endangering his conviction. Further, it is at the option of the respondent, whether he shall be a witness or not, and it is for him to decide whether or not he will assume the risks of testifying or hazard the dangers of silence.

The respondent, if guilty, may well hesitate before incurring the perils inevitably consequent upon adverse cross-interrogation. If, volunteering to testify, he answer truly, justice will be done.

If falsely, his answer will be false in whole or in part. But entire falsehood is hardly to be anticipated. It is the work of labor and invention as well as of danger—the danger the greater the more entire the falsehood—for it would be in direct conflict with every existing fact. But truth is the natural language of all. The witness from the necessity of his situation deviates in part therefrom. There will be then an admixture of truth and of falsehood—the relative proportions of each dependent upon the respondent's view of the emergencies of his condition and of his sagacity in providing for them. The truth to the extent uttered will receive corroboration from other trustworthy sources, and will tend to conviction. The falsehoods from their nature cannot be consistent with the truths of the case. Falsehood detected and disproved becomes an article of circumstantial evidence of no slight probative force. His truths and his falsehoods are alike perilous. He is pressed by question upon question. He evades or is silent. Evasion is suspicious. Silence is tantamount to confession. All this may be disastrous to the criminal, but justice is done.

As the law now stands, the confessions of a prisoner are received. But this is secondary evidence of inferior trustworthiness. Confessions may be misunderstood when heard—they may be misrecollected from lapse of time or other cause—they may be misstated from want of integrity on the part of the witness by whom they are narrated. The party who alone can correct the mistakes of original perception, the errors of recollection, or the falsehoods of design, is excluded, and this most dangerous and unreliable evidence is heard without the possibility of correcting it, when the means are readily attainable from the lips of the party alleged to have made such confessions.

True, the jury may err as to the just degree of credit to be given to this evidence. They have the same means in this as in other cases to arrive at sound conclusions. The appearance and manner of the witness—the probability of his statements, are all before them. The fear lest the exact degree of weight should not be accorded to any particular species of testimony, is no reason for its exclusion. If it were, all testimony might be excluded, for it can never be known in advance that the precise weight to which the statements of a witness are entitled will be given to them. It is incident to all tribunals that they may err in their conclusions as to the force and effect of evidence. Falsehood

may be credited. The truth may be disbelieved. But as this cannot be foreknown, it affords no reason for exclusion. There may be error after the hearing of a witness, and with all the means of a correct judgment thus afforded. But to exclude for presumed falsehood without hearing, is to convict without proof.

But the danger is not of undue credence. Those who would exclude a respondent from presumed untrustworthiness (notwithstanding the counter-presumption of innocence), will be little likely to be too credulous in regard to testimony they are unwilling to hear. Neither the position of the criminal nor his surroundings are such as to induce too implicit a reliance on his statements. The danger is, not that being false they will be believed, but rather that being true, they may not be credited.

I anticipate from the change proposed a greater certainty of correct decision in criminal proceedings. The guilty will be less likely to escape. The danger of the unjust conviction of the innocent will be diminished.

I am, with great consideration,

Very truly yours,

JOHN APPLETON.

Hon. D. E. WARE.

EARLY BANKRUPT LAWS.

The Act of 34 and 35 Henry VIII. c. 4 (A. D. 1542–3) is conceded to be the first English statute on the subject of bankruptcy. It is entitled "An Act against such persons as do make Bankrupt," and defines the status of bankruptcy in the preamble, namely: "Where divers and sundry persons, craftily obtaining into their hands great substance of other men's goods, do suddenly flee to parts unknown, or keep their houses, not minding to pay or restore to any of their creditors their debts and duties, but at their own wills and pleasures consume the substance obtained by credit of other men for their own pleasure and delicate living, against all reason, equity, and good conscience."

This statute operated upon *all* persons, whether traders, or merchants, or not. The 13 Elizabeth, cap. 7 (A. D. 1570), entitled "An Act touching orders for Bankruptcy," introduced into English jurisprudence the restriction of the status of bankruptcy to merchants or traders; and this statute was evidently